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In the Supreme Court of the United States

OCTOBER TERM, 1991

UNITED AUTOMOBILE, AEROSPACE, AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, LOCAL 376,
PETITIONER

v.

OLIVETTI OFFICE U.S.A., INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals erred by setting aside the Board's remedy for petitioner's unfair labor practice and by then fashioning its own remedy instead of remanding the case to the Board.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-18a) is reported at 926 F.2d 181. The supplemental decision and order of the National Labor Relations Board (Board) (Pet. App. 19a-43a) are reported at 298 N.L.R.B. No. 73. The initial decision and order of the Board (Pet. App. 44a-93a) are reported at 284 N.L.R.B. 810.

JURISDICTION

The judgment of the court of appeals (Pet. App. 97a-99a) was entered on March 27, 1991. A petition for rehearing was denied on April 2, 1991 (Pet. App. 95a). The petition for a writ of certiorari was filed on July 1, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Respondent Olivetti (formerly Roytype Division, Triumph-Adler Royal, Inc.) (the Company) was engaged in manufacturing and distributing typewriter ribbons and cartridges at a plant in Newington, Connecticut. Petitioner UAW Local 376 (the Union) entered into a two-year collective agreement with Olivetti, effective March 28, 1983, covering production employees at that plant. Pet. App. 56a.

In mid-1983, the Company began developing a cost-reduction program to counter serious financial losses. Pet. App. 57a. In November 1983, the Company met with the Union to discuss its program and the Union requested various financial information to verify the claims of financial hardship. At a February 21, 1984, meeting with the Union, the Company supplied only some of the information requested and informed the Union that it intended to make final recommendations by March 21 to the parent company's board of directors on a subcontracting and relocation plan. The Union protested the short time frame as insufficient for bargaining and also complained that the Company had not furnished all of the information requested. Pet. App. 57a-60a.

The Union and the Company met four times in March to discuss the Company's plans; at the final meeting the Union rejected the Company's last coun-

ter-proposal because the Company had not furnished all of the previously requested information. Pet. App. 62a-64a. On April 9, the Company announced its intention to subcontract some of the unit work to a firm in Mexico, and to relocate the plant in a southeastern State to perform the rest of the unit work. Pet. App. 30a.

The Company began the first phase of its plan in July 1984 by subcontracting unit work to a company located on the border of Texas and Mexico. Pet. App. 65a. The first layoffs and terminations of the Newington employees occurred in November 1984. Pet. App. 30a. Relocation of additional unit work to Georgia began in the first quarter of 1985. The Company continued its previous business of manufacturing and distributing typewriter ribbons at these new locations with newly hired employees. Pet. App. 5a, 31a. The Company sold its wide film and fabric operation, a separate component of its business, in May 1986. Pet. App. 22a n.8. The remainder of the Newington employees were terminated in July 1986, and the Company vacated the Newington plant completely in March 1987. Pet. App. 30a-31a.

During the relocation/subcontracting process the Company and the Union negotiated a successor two-year collective-bargaining agreement that became effective March 25, 1985. That agreement was essentially the same as the initial agreement, except for an increase in the wage and benefit structure. C.A. App. 1438-1457. The parties also negotiated a side agreement to settle negotiations over the effects of the Company's work relocation decision. That agreement provided for the Company to pay all employees laid off after November 21, 1984, a lump sum of $250 and a further payment of $50 to settle pension issues. *Id.* at 1622.

2. In its initial June 30, 1987 decision, the Board, upholding the administrative law judge (ALJ), found that the Company had violated Section 8(a)(5) and (1) of the National Labor Relations Act, 29 U.S.C. 158(a)(5) and (1), by implementing its decision to subcontract and relocate unit work without bargaining to impasse with the Union, and by failing to furnish the Union with relevant information that was necessary for bargaining. Pet. App. 44a-51a. However, the Board remanded the case to the ALJ because the remedial order recommended by the ALJ—which merely awarded the employees who had been terminated back pay from the date of their termination to March 23, 1985, when the collective bargaining agreement expired (Pet. App. 92a)—was erroneously premised on the assumption that the Newington plant had closed down by the time the ALJ issued his decision.[1] Pet. App. 51a.

In its supplemental decision and order issued on May 22, 1990, the Board found, in agreement with the ALJ, that an order requiring the Company to reestablish the Newington plant would be unduly burdensome. Pet. App. 20a. However, the Board disagreed with the ALJ that it would be appropriate to require the Company to bargain over the reestablishment of the Newington plant. Pet. App. 21a. Finding that a remedy "tailored to the present rather than past circumstances better effectuates the purposes and policies of the Act," the Board ordered the Company to offer its Newington employees reinstatement at its facilities where the unit work had

[1] The Board requested the parties to present facts relating to the hardship involved in transferring back to the Newington plant any of the unit work unilaterally subcontracted or relocated.

been relocated (with necessary traveling and moving expenses), dismissing, if necessary, any persons hired at those facilities. *Ibid.*[2] The Board further ordered the Company to make the Newington employees whole for any loss of earnings and other benefits suffered from the date of their termination to the date of the offer of reinstatement or, for employees who chose not to relocate, until they secured substantially equivalent employment. Pet. App. 22a-24a.[3]

3. The court of appeals upheld the Board's findings that the Company had unlawfully refused to bargain over its subcontracting and relocation plan and to supply relevant information concerning its financial condition. Pet. App. 3a. The court concluded, however, that the Board's back pay and reinstatement remedy was not appropriate in the circumstances of this case.

The court acknowledged that a remedy ordered by the Board is subject to limited judicial review, but added that "we cannot turn a blind eye to the ex-

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[2] If there were insufficient work for all employees to be offered reinstatement, the Board directed the Company to place the names of those for whom work is not available on a preferential hiring list, in order of their seniority, and to offer them jobs in the future before hiring other persons. The Board noted the Company's contention that reinstatement of the Newington employees would be impractical due to changes in the Company's operations and organizational structure, but concluded that consideration of that issue should be left to the compliance stage of the proceeding. Pet. App. 21a-22a & n.7.

[3] The order required the Company to make whole those employees formerly employed in the wide film and fabric operation until May 1986, when that operation was sold, offset by any severance payments. Pet. App. 22a n.8.

tensive administrative delay by the Board" and to the fact that "enforcement of the Board's remedy more than six years after the misconduct would truly 'mock reality.'" Pet. App. 15a. The court explained that the wrong committed by the Company lay not in its decision to subcontract and relocate, but in reaching that decision without first bargaining in good faith with the Union. Pet. App. 16a. The Board's back pay order, the court concluded, "is unreasonable because it assumes that, had the parties negotiated, those negotiations would have continued for six years, and possibly into the future." Pet. App. 17a.[4]

Recognizing that ordinarily it would remand this case to the Board for further proceedings to impose a proper remedy, the court, stating that "[i]t would be a grave injustice to prolong this matter," proceeded to modify the Board's order. Pet. App. 17a. The court agreed with the Company that "the remedy should be limited to back pay for a reasonable period of time in which the parties should have bargained over the work transfer decision." *Ibid.* The court found that, had the parties bargained over the work-transfer decision, "the process would have continued, at the longest, to the point when a new collective bargaining agreement was negotiated. At that point, any negotiations pertaining to the work-

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[4] The court also stated that, "[i]n essence, the Board's order compensates workers for the *effects* of the work transfer rather than for the unlawful *decision* to transfer work without bargaining. Such a remedy is improper here, however, because the affected bargaining-unit workers have already been compensated for the *effects* of the work-transfer decision by a contractual obligation entered into between the Company and the Union in conjunction with the successor collective bargaining agreement." Pet. App. 16a.

transfer decision would have merged into the negotiations for a new contract." Pet. App. 18a. Accordingly, the court decreed that "back pay for all affected bargaining unit employees should end as of March 23, 1985." *Ibid.*

Finally, the court declined to enforce the Board's reinstatement order. It concluded that, "[i]n the years intervening between the Company's unfair labor practices and the Board's final remedy, the internal structure of the Company has changed to such a degree as to make reinstatement [of all bargaining unit employees] not only unreasonable but unrealistic." Pet. App. 18a.

ARGUMENT

The Board agrees with petitioner that the court of appeals erred in concluding that the Board's back pay and reinstatement order was not an appropriate remedy for the Company's refusal to bargain over the work-transfer decision and in fashioning its own remedy for that violation instead of remanding the remedy question to the Board for reconsideration. Nonetheless, the Board does not believe that, under the circumstances of this case, further review by this Court is warranted merely to correct the court of appeals' errors.

1. The court of appeals held that the Board's remedy was inappropriate because, in the court's view, it did far more than merely compensate the employees for the wrong that had been committed. The court apparently believed that, because bargaining over the decision to relocate would not in any event have continued for the entire six-year period following implementation of the decision to relocate, requiring the Company to provide back pay for that entire period

"compensates union workers for the *effects* of the work transfer rather than for the unlawful *decision* to transfer work without bargaining." Pet. App. 16a. Since the workers had already been compensated pursuant to the 1985 collective agreement for the effects of the transfer, the court held that the Board's remedy was improper. Cf. *Nathanson* v. *NLRB*, 344 U.S. 25, 27 (1953) (purpose of back-pay award is to "mak[e] the employees whole for losses suffered on account of an unfair labor practice").

The Board disagrees with the court of appeals' conclusion. Had the Company complied with the law by providing relevant information so that the Union could bargain intelligently with it over its decision to transfer work, the employees would have retained their jobs and earned their wages at least until the Company bargained to a good-faith impasse; had the parties reached agreement on an alternative to the transfer of work, the employees would have retained their jobs still longer. The Company's failure to fulfill its statutory obligation makes it impossible to determine how long such bargaining would have gone on, or the extent to which the Company might have modified its work-transfer decision as a result of the bargaining. Consequently, the Board's remedy reasonably placed the burden of the uncertainty on the Company that committed the unfair labor practice, rather than on the employees who were the innocent victims.

Nonetheless, the Board does not believe that further review is warranted. Petitioner contends that the court of appeals' decision is "directly contrary" (Pet. 7) to this Court's decision in *NLRB* v. *J.H. Rutter-Rex Mfg. Co.*, 396 U.S. 258 (1969). In *Rutter-Rex*, however, the court of appeals impermissibly shifted

the burden of agency delay from the wrongdoing employer to the innocent employees by cutting off a back pay award at an arbitrary date, thereby resulting in uncompensated losses to the employees. In contrast, the court in this case found that the Board's remedy was impermissible because it overcompensated employees by providing back pay beyond the time when the required bargaining would have concluded. Although we believe this conclusion was wrong, the court did not hold that the employees, rather than the Company, should bear the burden of the delay in the administrative process.[5]

2. The court of appeals also erred in fashioning its own remedy, rather than remanding to the Board for further remedial proceedings. See *Sure-Tan, Inc.* v. *NLRB*, 467 U.S. 883, 898-899 (1984). This error also does not warrant further review by this Court.

The court of appeals recognized that it should ordinarily "remand this case to the Board for further proceedings to impose a proper remedy," Pet. App. 17a, but declined to remand the case in light of excessive delays in the proceedings before the Board. The problem of Board delay has recently been sub-

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[5] Similarly, the court's decision does not conflict with *NLRB* v. *Seligman & Associates*, 808 F.2d 1155, 1161 (6th Cir. 1986), cert. denied, 484 U.S. 1026 (1988), or *NLRB* v. *Walkill Valley General Hospital*, 866 F.2d 632, 637 (3d Cir. 1989). In both of those cases, the courts of appeals held that the passage of time during the Board's consideration of the case had not altered the fact that the Board's remedy provided appropriate compensation for the wrong that had been committed. In this case, the court of appeals rejected the Board's remedy on the basis of the court's conclusion—with which we disagree—that the remedy compensated the employees for the effects of the work transfer, as to which effects the employer and union had reached a collective agreement.

stantially mitigated, however, and is unlikely to recur.[6] It should be assumed, therefore, that the Second Circuit will respect the division of responsibility between the Board and the courts in future cases. Review is therefore unnecessary at this time.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[6] The Board has implemented the recommendations of the General Accounting Office that it put into place a time limit for each decision stage as well as for final issuance of decisions. Moreover, the Board has reduced its backlog from 1,679 unfair labor practice and representation cases in February, 1984, to 523 cases in January, 1991. See Statement of James M. Stephens, Chairman of the National Labor Relations Board, *Departments of Labor, Health and Human Services, Education, and Related Agencies Appropriations for 1992: Hearings Before a Subcomm. of the House Comm. on Appropriations*, 102d Cong., 1st Sess. Pt. 7, at 593 (1991).

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